

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2018 NOV 27 AM 9:35

CLERK

BY

DEPUTY CLERK

UNITED STATES OF AMERICA)

v.)

JEFFRY ROBTOY and ANDRE HUDSON,)

Defendants.)

Case No. 5:18-cr-33-1, 2

ORDER ON MOTIONS TO SUPPRESS
(Docs. 22, 27)

Defendants Jeffry Robtoy¹ and Andre Hudson are charged with conspiracy and possession with intent to distribute heroin and cocaine base. Both have filed motions to suppress the results of a search of Mr. Robtoy's apartment in St. Albans, Vermont on November 2, 2017. (Docs. 22, 27.)

The court held an evidentiary hearing on October 9, 2018 and October 31, 2018.

FACTS

On November 2, 2017, officers from the St. Albans police department and the Franklin County Sheriff met at 45 North Elm Street. The Sheriff was present in order to execute a writ of possession (Gov't Ex. 2) issued by the Vermont Superior Court, Franklin Unit in an eviction case brought against Mr. Robtoy by his landlord. The police officers were present to provide back-up for the Sheriff and to arrest Mr. Robtoy on an unrelated state court arrest warrant (Gov't Ex. 1) for failure to appear for arraignment in July 2017 on a simple assault charge. Richard Blouin on behalf of the landlord was also present.

¹ The court understands that Mr. Robtoy's first named is spelled "Jeffry," and has updated the caption to reflect the correct spelling.

No one responded when one of the officers knocked on the door. Mr. Blouin started to drill the door lock. The door suddenly opened. The officers were admitted into the apartment by a young woman. The apartment was dark and extremely cluttered. It consisted of a front living room, two bedrooms, and a bathroom.

Proceeding into the apartment, officers opened the door to one bedroom found an African-American male lying prone on his bed. The officers knew that the male was not Mr. Robtoy, who is white. A second young woman named Leah Dugan was in the other bedroom. She stated that the room contained no drugs, only paraphernalia. The bedroom contained crack pipes, a marijuana pipe, a digital scale, a burnt spoon and several hypodermic needles and caps—all placed in the open.

The officers returned to the doorway of the room with the sleeping male. After several shouted commands, the male got up from the bed. The officers handed him his pants. He provided an ID which identified him as Mr. Hudson. He had no active arrest warrants. He explained that he was from Willimantic, Connecticut and was visiting his girlfriend at the University of Vermont (UVM) in Burlington. In Mr. Hudson's bedroom, officers observed a pile of U.S. currency on the nightstand. There was also a plate with a razor blade.²

Mr. Robtoy was located in the bathroom with the door closed. He emerged voluntarily and was arrested.

The officers announced their intention of getting a search warrant. Both young women left the apartment. Mr. Hudson identified the belongings which were his and left also. He was

² The affidavit submitted in support of the application for a search warrant (discussed below) states that there were two razor blades. Body camera footage from one of the officers shows only one razor blade. The distinction is irrelevant to the issues in the case.

permitted to take the cell phone which he possessed when the officers found him on the bed. He was instructed to leave additional cellphones and an iPad behind.

After all occupants had left the apartment (including Mr. Robtoy who remained under arrest), the St. Albans police applied for and obtained a search warrant from Vermont state court. (Gov't Ex. 5.)

ANALYSIS

Defendants take issue with the officers' authority to enter the apartment as well as their authority to conduct a sweep of the premises.

I. Authority to Enter the Apartment

The officers had two independent bases which allowed them to enter the apartment: a writ of possession and an arrest warrant.

A. Writ of Possession

The Sheriff had a writ of possession. The records of the Superior Court in the eviction case show that the court entered an order on September 20, 2017, which provided in relevant part that "writ of possession shall issue immediately, with 14 days to vacate." (Gov't Ex. 2.) The writ itself was issued by the court clerk on September 20 and provides for the 14 day grace period. (*Id.*) The Sheriff's testimony established that his own records indicate that after three efforts to serve the writ of possession on Mr. Robtoy in person were unsuccessful, the landlord obtained a "tack order" which allowed for service by affixing the writ to the front door. The Sheriff's records established that service by tack order occurred on October 19, 2017. (Gov't Ex. 3.)

The record establishes that the writ of possession issued in the normal course of an eviction proceeding and was served on the defendant two days before the Sheriff arrived to

remove him from the premises. The writ of possession authorizes the sheriff to put the landlord into possession of the premises. 12 V.S.A. § 4854. Such an action obviously requires entry into the premises. That was what occurred in this case.

B. Arrest Warrant

In addition to the writ of possession, the St. Albans police officers knew that there was a valid arrest warrant outstanding for Mr. Robtoy. The apartment was known to be his residence. The arrest warrant served as a second basis for entry into the apartment. *See United States v. Bohannon*, 824 F.3d 242, 249 (2d Cir. 2016) (“[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” (quoting *Payton v. New York*, 445 U.S. 573, 603 (1980))).

II. Sweep of the Apartment

Based on the authority of the arrest warrant, the officers could lawfully search anywhere in the apartment that Robtoy might have been found. *Maryland v. Buie*, 494 U.S. 325, 330 (1990). The court rejects Mr. Hudson’s suggestion that it was unlawful for the officers to open the bedroom doors when they first entered the apartment. Robtoy had not been found at that point, and the officers were authorized to look for him in those rooms.

Moreover, once entry was achieved, the officers were permitted to conduct a quick sweep of the apartment. Such a search is authorized to protect officers from harm from someone hiding in the apartment. *See United States v. Escobar*, 805 F.2d 68, 71 (2d Cir. 1986) (“Law enforcement officers may conduct a security check—a quick and limited pass through the premises to check for third persons—without a warrant when making an arrest on private premises when they reasonably fear that other persons are lurking within who may pose a threat

to their safety or are likely to destroy evidence.”). The officers did not know and could not see how many individuals were in the dimly-lit apartment when they entered, and the circumstances justified a security sweep for officer safety.

The sweep is also authorized as part of the process of seizing the apartment pending issuance of a search warrant. Under the circumstances, the officers needed to ensure that nobody in the apartment would destroy evidence while they applied for a search warrant. *See id.*; *see also United States v. Wolfe*, No. 5:15-cr-68-1, 2015 WL 8780544, at *4 (D. Vt. Dec. 15, 2015) (discussing security sweep exception). Finally, Sherriff Norris credibly testified that, to execute the writ of possession, his office needed to confirm that the apartment is empty and that exclusive possession had been restored to the landlord. (Doc. 45 at 8.)

The objects which formed the basis for the search warrant were all in plain view on tables and counters. Evidence of wrong-doing in plain view may be used to support a subsequent application for a search warrant. *See United States v. Sosunov*, No. 17-cr-0350 (KBF), 2018 WL 2095176, at *11 (S.D.N.Y. May 7, 2018) (evidence seen in plain view during protective sweep was properly used to support search warrant application).

At one point in the sweep, one of the officers opened a box to look inside. That aspect of the search exceeded the purpose of the sweep. But the box contained no contraband and its search did not play any role in the process of obtaining the search warrant. Looking into the box exceeded the scope of the limited warrantless search required for purposes of officer safety and to secure the apartment. It is inconsequential in this case, however, since it led to no discovery of contraband or other evidence of crime.

The rationales discussed above authorized the sweep of the apartment. The officers did not otherwise exceed the scope of the sweep or convert it into a general search. This case is

unlike *United States v. Sanford*, 493 F. Supp. 78, 81 (D.D.C. 1980), because at the time the officers made the relevant observations, they had not completed their lawful mission of accounting for all the persons in the apartment (including Mr. Robtoy, who was subject to an arrest warrant) and removing those individuals to execute the writ of possession.

III. Brief Detention of Mr. Hudson

Mr. Hudson was found lying on a bed in his underwear. He was briefly detained for questioning about his identity and presence in the apartment before he was sent on his way after getting dressed. This brief investigative stop was supported by reasonable suspicion of wrongdoing and did not exceed the scope of a *Terry* stop. Mr. Hudson was questioned briefly because he was visiting an apartment which contained potential evidence of crack and heroin use. After he identified himself, he was allowed to leave. His brief questioning did not violate the Fourth Amendment. (There is no claim by Hudson that his Fifth or Sixth Amendment rights were violated.)

IV. Basis for the Search Warrant

The application for the search warrant included a detailed affidavit which provided a strong basis for concluding that there was probable cause sufficient to justify a search. The information in the affidavit included Mr. Robtoy's history of involvement in drug dealing, the drug paraphernalia in one bedroom, and the cash and razor blade (frequently used to chop up cocaine into fine powder) in the other. Mr. Hudson described the other occupants of the apartment as drug users. His description of himself as a short-time visitor who was really in Vermont to see his girlfriend at UVM (some 30 miles away) was unprepossessing. All of these facts provided ample justification for the issuance of a search warrant.

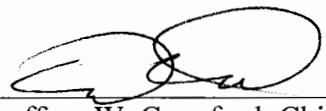
V. Standing

Because the court determines that the search was constitutional on the merits, there is no need to resolve the separate issue of whether Mr. Hudson's sojourn at the apartment was long enough to give rise to a reasonable expectation of privacy.

CONCLUSION

The court DENIES defendants Robtoy and Hudson's motions to suppress (Docs. 22, 27).

Dated at Burlington, in the District of Vermont, this 26th day of November, 2018.



Geoffrey W. Crawford, Chief Judge
United States District Court